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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 368

ANTHONY P. MILLER, INC., and NEW AMSTERDAM CASUALTY CO.,

Petitioners,

v.

WALTER S. KOZDRANSKI CO., INC., AMERICAN HOUSES, INC. and RAY BURROUGHS,

Respondents.

REPLY TO BRIEF IN OPPOSITION

It is said in opposition that at no time in the courts below was a federal question asserted.

(1) As to the validity of the liens, the question was initially specifically placed in issue in the answer filed by the United States Attorney who demanded (R. 81) that the project premises be declared "free and clear of any mechanics' lien or other interest of the plaintiff." That aside, the trial court expressly ruled that the project, while constructed for the Air Force, was built under the Capehart Act "and was therefore technically not a public improvement." (R.19). Accordingly, the issue whether this housing project was a "public work" (an

obviously federal question) was expressly passed on and hence is eligible for review here even in the absence of its having been raised by the pleadings. *Whitney* v. *California*, 274 U.S. 357, 360-361.

(2) As to the point that the exclusive remedy, in the light of the federal disputes clause in the contracts, is before the contracting officer, this was raised repeatedly at the trial. (R. 132-3, 140, 311-12, 425-6; and see 732-3, 793).[1] It was expressly passed upon by the trial court where the contracting officer's decision was unfavorable to petitioner. (R. 22-24).[2] The point was renewed in the Appellate Division, Appellant's Brief, pages 11-15, 29, 59-60, 117.

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[1] The following quotations are from the transcript of the trial, and reflect examples where petitioner's attorney did raise the finality of the contracting officer's decision:

> ". . . we were bound by the contracting officer's decision, and Mr. Kozdranski, we feel, was also bound." (R. 132) "It [the prime contract] provided that the contracting officer's determination shall be final . . ." (R. 133) "And here again, as shown by the contract, we have our friend, the contracting officer, who made the determination." (R. 140) ". . . I would like to move to dismiss the fourth cause of action . . . [T]he decision of the contracting officer, which was to the effect that the matter is not to be paid for as an extra, is controlling as of this date." (R. 311-12) ". . . I move to dismiss the cause of action stated by American Houses . . . [T]here were back charge notices sent in, some . . . of which were apparently based on the contracting officer's inspections decisions." (R. 425-6)

[2] The trial court said "A determination was made on appeal that such rock removed was properly chargeable as an extra. The general contract makes such decision final and conclusive and therefore . . . plaintiff [Kozdranski] is entitled to recover . . . ." (R. 23)

Immediately following, the trial court refused to make the same holding on another claim where the contracting officer had ruled *for* petitioner, on the ground that the disputes appeal machinery was still pending. The court thus disregarded the contracting officer's ruling and made a de novo ruling *against* petitioner. (R. 23-4)

The assertion that there is a state ground of decision adequate to support the judgment is likewise untenable. This is said to arise because judgments *in personam* were claimed as alternatives to the enforcement of the liens. This alternative did not come about since the liens were enforced, the court expressly finding as to each respondent that "the plaintiff has valid liens against the property in suit which may be enforced by judgment against the defendants [petitioners]. . . ." (R.28, Fol. 83; R. 35, Fol. 105; R. 40, Fol.120). That aside, it would be no more fitting to evade the exclusive remedy set up by federal statute through a suit *in personam* than it would by suit *in rem*, and the point is no more a "state" ground of decision than the one actually adopted by the trial court.

The suggestion (Opp. p. 5) that no issue was involved before the contracting officer which concerned respondents and that these were simply disputes between the prime contractor and subcontractors in which the United States had no interest is belied by the fact that the performance of the contract—the compliance with plans and specifications—is of the very essence of the contracting officer's concern and that of the United States. The disputes arose as a result of the rejection of work and materials by the contracting officer—not as the result of some dispute between the contractor and the subcontractors. Clearly the contracting officer was more than a mere arbitrator.

Since scant attention is paid in the brief in opposition to conflicts with the decisions of circuit courts of appeals which we set forth in the petition, we feel those conflicts speak for themselves in showing the necessity for this Court's exercise of jurisdiction.

Respectfully submitted,

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